

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MICHAEL C. JOHNSON,	)	Case No. C 15-2207 PSG (PR)
	)	
Plaintiff,	)	<b>ORDER OF SERVICE AND</b>
	)	<b>DIRECTING DEFENDANTS TO</b>
v.	)	<b>FILE DISPOSITIVE MOTION</b>
	)	<b>OR NOTICE THAT SUCH</b>
EL CERRITO POLICE DEPARTMENT, et	)	<b>MOTION IS UNWARRANTED</b>
al.,	)	
	)	
Defendants.	)	
_____	)	

Michael C. Johnson, proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983.<sup>1</sup> He has been granted leave to proceed in forma pauperis in a separate order. For the reasons stated below, the court serves the complaint on Defendants Chi Lee and Mario Guzman of the El Cerrito Police Department.

**I. DISCUSSION**

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner

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<sup>1</sup> Johnson has consented to magistrate judge jurisdiction. (Docket No. 1 at 4.)

1 seeks redress from a governmental entity or officer or employee of a governmental entity.<sup>2</sup> In its  
 2 review, the court must identify any cognizable claims and dismiss any claims that are frivolous,  
 3 malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a  
 4 defendant who is immune from such relief.<sup>3</sup> *Pro se* pleadings must, however, be liberally  
 5 construed.<sup>4</sup>

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
 7 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that  
 8 the alleged deprivation was committed by a person acting under the color of state law.<sup>5</sup>

9 B. Johnson's Claim

10 On December 27, 2012, Johnson was at the Chevron gas station in El Cerrito, where his  
 11 girlfriend worked. Johnson and his girlfriend were arguing when El Cerrito police officers  
 12 arrived "to a domestic dispute." Johnson states that there was a weapon at the scene, but it was  
 13 not used or pointed at the police officers. The police officers pulled their weapons and fired  
 14 them, hitting Johnson multiple times. Liberally construed, Johnson states a cognizable claim of  
 15 excessive force.

16 To the extent Johnson names the El Cerrito Police Department as a defendant, it is  
 17 DISMISSED with leave to amend. Local governments are "persons subject to liability under 42  
 18 U.S.C. § 1983 where official policy or custom causes a constitutional tort; however, a city or  
 19 county may not be held vicariously liable for the unconstitutional acts of its employees under the  
 20 theory of respondeat superior.<sup>6</sup> To impose municipal liability under Section 1983 for a violation  
 21 of constitutional rights, a plaintiff must show: (1) that the plaintiff possessed a constitutional

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22 <sup>2</sup> See 28 U.S.C. § 1915A(a).

23 <sup>3</sup> See 28 U.S.C. § 1915A(b)(1), (2).

24 <sup>4</sup> See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

25 <sup>5</sup> See *West v. Atkins*, 487 U.S. 42, 48 (1988).

26 <sup>6</sup> See *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978).

1 right of which he or she was deprived; (2) that the municipality had a policy; (3) that this policy  
 2 amounts to deliberate indifference to the plaintiff's constitutional rights; and (4) that the policy is  
 3 the moving force behind the constitutional violation.<sup>7</sup> As currently pled, Johnson has not stated a  
 4 cognizable claim against the El Cerrito Police Department. If Johnson believes that he can state  
 5 a cognizable claim against the El Cerrito Police Department, he may amend his complaint within  
 6 thirty days.

## 7 **II. CONCLUSION**

8 The court orders as follows:

9 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of  
 10 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint  
 11 and all attachments thereto, a Magistrate Judge consent form, and a copy of this order to **Chi Lee**  
 12 **and Mario Guzman at El Cerrito Police Department.**

13 The Clerk also shall mail a courtesy copy of the amended complaint and a copy of this  
 14 order to the El Cerrito City Attorney at 10890 San Pablo Ave., El Cerrito, CA 94530.  
 15 Additionally, the Clerk shall mail a copy of this order to Johnson.

16 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure  
 17 requires them to cooperate in saving unnecessary costs of service of the summons and complaint.  
 18 Pursuant to Rule 4, if defendants, after being notified of this action and asked by the court, on  
 19 behalf of Johnson, to waive service of the summons, fail to do so, they will be required to bear  
 20 the cost of such service unless good cause be shown for their failure to sign and return the waiver  
 21 form. If service is waived, this action will proceed as if defendants had been served on the date  
 22 that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), defendants will not be required  
 23 to serve and file an answer before sixty (60) days from the date on which the request for waiver  
 24 was sent. Defendants are asked to read the statement set forth at the bottom of the waiver form  
 25 that more completely describes the duties of the parties with regard to waiver of service of the  
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27 <sup>7</sup> See *Plumeau v. School Dist. #40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

1 summons. If service is waived after the date provided in the Notice but before defendants have  
2 been personally served, the answer shall be due sixty (60) days from the date on which the  
3 request for waiver was sent or twenty (20) days from the date the waiver form is filed, whichever  
4 is later.

5 3. No later than sixty (60) days from the date the waiver is sent, defendants shall file  
6 one comprehensive motion for summary judgment or other dispositive motion with respect to the  
7 cognizable claims in the complaint. At that time, defendants shall also submit the Magistrate  
8 Judge's consent form.

9 Any motion for summary judgment shall be supported by adequate factual documentation  
10 and shall conform in all respects to Fed. R. Civ. P. 56. Defendants are advised that summary  
11 judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If  
12 defendants are of the opinion that this case cannot be resolved by summary judgment, they shall  
13 so inform the court prior to the date the summary judgment motion is due.

14 4. Johnson's opposition to the dispositive motion shall be filed with the court and  
15 served on defendants no later than twenty-eight (28) days from the date defendants' motion is  
16 filed. Johnson is advised to read Rule 56 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)  
17 (holding party opposing summary judgment must come forward with evidence showing triable  
18 issues of material fact on every essential element of his claim).

19 5. Defendants shall file a reply brief no later than fourteen (14) days after Johnson's  
20 opposition is filed. The motion shall be deemed submitted as of the date the reply brief is due.  
21 No hearing will be held on the motion unless the court so orders at a later date.

22 6. All communications by Johnson with the court must be served on defendants or  
23 defendants' counsel, by mailing a true copy of the document to defendants or defendants'  
24 counsel.

25 7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
26 No further court order is required before the parties may conduct discovery.

27 8. It is Johnson's responsibility to prosecute this case. Johnson must keep the court

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1 and all parties informed of any change of address and must comply with the court's orders in a  
2 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
3 pursuant to Federal Rule of Civil Procedure 41(b).

4 IT IS SO ORDERED.

5 DATED: 9/17/2015

  
PAUL S. GREWAL  
United States Magistrate Judge